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BY ECF

Honorable Laura Taylor Swain
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Nunez, et al. v. City of New York et al*, 11-cv-5845 (LTS)

Dear Chief Judge Swain:

Defendants the City of New York (“City”) and Department of Correction (the “Department”) (collectively “Defendants”) write to provide the Court with an update prior to the status conference on April 27, 2023, at 2:00 PM.¹

The Defendants appreciate the Monitor’s exhaustive and analytical status report submitted on April 3, 2023 (“Report”), and generally agree with its assessments. The Report shows that under the leadership of Commissioner Louis Molina, the Department has continued to implement sweeping improvements in procedures, practices and personnel, resulting in significant progress in implementing the Action Plan. The Defendants remain committed to the core goal of the Nunez Consent Judgment: achieving safety and security for all of those who are in the Department’s custody. We are mindful of the work remaining, and, as noted below, the Department has agreed with the Monitor on the timetable for certain specific next steps and will continue to work closely with the Monitoring Team in implementing its recommendations.

¹ On April 26, 2023 at approximately 1 p.m., the Legal Aid Society filed a voluminous letter with the Court. (ECF No. 522). This letter does not purport to respond to the contents of that submission. Upon brief review, Legal Aid’s submission does not appear to seek relief other than the Order that it previously proposed, which is addressed herein. Should the Court determine that it would be helpful for the Defendants to respond to the contents of today’s filing, they will do so at some time after the upcoming conference.

Reductions in Violence and Use of Force. The core purpose of the Nunez Consent Judgment, the Court’s Remedial Orders, and the Action Plan is to enhance the safety and security of persons in custody and reduce uses of force in their frequency and severity. Consent Judgment (ECF No. 249) at 1-2. The Department’s overall rate of use of force has declined from 12.1 per 100 incarcerated individuals in June 2022 to 9.2 in March 2023. In all, there was a decline of over 1,000 use of force incidents from 2021 to 2022. Report at 48. In March 2023, only 4.6% of use of force incidents were characterized as Class A (the most serious) as compared to 6.1% in June 2022. The percentage of use of force incidents resulting in no injuries increased from 63% in 2016 to 83% in 2022. *Id.* at 49. Although 2021 and 2022 showed an increase in slashings and stabbings from 2020, those incidents have declined by 36% from 50 in January 2022 to 32 in March 2023. *See Report at 36-37* (“For example, the average monthly UOF rate decreased for the first time in many years, staff were assaulted less often, and a small decrease in the rate of fights was evident in 2022.”) The Department remains committed to substantially reducing incidents of use of force and violence going forward.

As the Monitor noted, the Department continues to implement the Commissioner’s Violence Reduction Plan at the Robert N. Davoren Center (“RNDC”), which houses its youngest individuals. In March 2022, there were 24 stabbings/slashings at RNDC; there were 5 in March 2023. Uses of Force also declined from 111 in March 2022 to 81 in March 2023, a 27% decline. The George R. Vierno Center (“GRVC”) has been the facility most troubled by violence, and its residents present the highest security risks of the Department’s custodial population. Accordingly, increasing safety and security at that facility has been a focus of the Department. Here, the Department has also had significant success. Comparing October 2022 to March 2023, slashings and stabbings are down at GRVC 70.8%, and Use of Force incidents are down 63.7%. The Report acknowledges these improvements. *See Report at 37* (“Further, the Department’s focus on two specific facilities, RNDC and GRVC, appear to be yielding encouraging results.”) & 57-58 (“The short term results following implementation of the Commissioner’s Violence Reduction Plan by RNDC’s leadership suggest that the Plan and other security related initiatives are beginning to accomplish the long-term goal of reducing violence and disorder.”)

Staffing Improvements. The number and quality of staff and supervision are crucial to safety and security. As the Report notes, the Department has made sweeping improvements in this area. The Monitor has noted a “decrease[] in the number of unstaffed posts, [a] decrease in staff working triple shifts, as well as [an] increase in the number and proportion of staff available to work with the incarcerated population.” Report at 14 (finding decrease of 99% in unstaffed posts and 78% reduction in triple shifts); *see also Id.* at 12. In addition, the Department has restructured the schedules for Deputy Wardens (“DWs”) so that many of those previously scheduled to work 7:00a.m. to 3:00p.m. are now scheduled to work evenings (e.g., many DW shifts are now from 1:00p.m. to 9:00p.m.) and weekends to ensure sufficient supervisory coverage on all tours. While a DW may not be present on every tour in every facility, Assistant Deputy Wardens (ADWs) and Captains are assigned on a 24-hour basis 7 days a week. ADWs and Captains are scheduled on all three shifts to include relief factors so there is a continuity of command. In addition, a minimum of three ADWs are scheduled for each tour and additional ADWs are scheduled on the 6:00a.m. to 2:00p.m. and 2:00p.m. to 10:00p.m. shifts to increase supervision in sensitive areas.

The Department has also implemented the Monitor’s recommendations to increase senior staff and enlist highly qualified managerial talent from outside its ranks. *See Report at 34.* Since January 2022, the Department has appointed more than 40 new leaders from outside, many of whom have extensive law enforcement experience. *See Action Plan (B)(3); Report at 111-112.* Since the last court conference, a new Deputy Commissioner of Training and Development was hired, who has three decades of criminal justice and academic experience, and a new Deputy Commissioner of Health Affairs was appointed, who has more than 25 years’ experience working with municipal agencies in health operations and healthcare compliance. The Monitor noted that the four new Deputy Commissioners for (1) Classification, Custody Management and Facility Operations; (2) Administration; (3) Security; and (4) Training and Development and the two new Associate Commissioners of Operations “are making administrative gains that catalyzed some positive organizational momentum.” Report at 4.

Among the newest senior staff appointees are three Assistant Commissioners hired outside the Department’s ranks to manage its facilities. All have extensive experience in corrections. One of the three comes from Las Vegas, where she was Deputy Chief of the City’s Department of Public Safety, responsible for security, training, recruitment, and compliance; she has 22 years of experience in corrections, beginning as a correctional officer. The second worked for the Connecticut Department of Correction for more than 23 years, most recently as a Warden of one of its facilities. The third has more than 30 years’ experience in federal and state correctional facilities, most recently as the Assistant Deputy Commissioner of the Alabama Department of Correction, where he oversaw the daily operation of the state’s 23 male correctional facilities. A fourth individual has agreed to come on-board and is finishing the approval process. Two highly regarded individuals who held the rank of Acting Warden will also serve as Assistant Commissioners.

The Department’s improvements in staffing practices “include the appointment of a Staffing Manager with significant expertise in sound correctional practices for managing Staff, the use of automated workforce management/scheduling software . . . for roster management, sorely needed updates to antiquated staffing conventions, and a new focus by the Department (including new protocols and enforcement strategies) on properly managing staff on leave and modified duty.” Report at 16. The Department’s new Deputy Commissioner for Administration (referred to as the “Staffing Manager” in the Report), hired in September 2022, is the driving force behind many of these improvements. *See Action Plan C.* He has “continue[d] to untangle the Department’s complex staffing problems in order to develop and implement multi-faceted solutions.” Report at 18. As the Report highlights, “[t]he positive impact of the Staffing Manager, his team, and other leaders in the agency who have supported this effort . . . is clearly evident.” Report at 27; *see generally d.* at 22-27 (detailing numerous achievements in enhanced staffing practices).

Medical Leave. The Department has long suffered staffing shortages. In part these arose from attrition and sick leave dating from the COVID-19 pandemic. As called for by the Action Plan, the Department has taken aggressive steps to reduce sick leave abuse. It has already seen marked improvement, with the daily average number of staff who are on MMR3 status (restricted from working directly with incarcerated individuals) declining from 685 in January 2022 to 401 in March 2023. In addition, the Department has resolved approximately 85% of its

pending Medical Incompetence cases. *See Report at 31-33* (detailing Department efforts to resolve Medical Incompetence cases). The Monitor and the Department have agreed to resolve all of the pending medical disciplinary cases by August 31, 2023 for active staff.

The Department has achieved a substantial decline in the staff use of sick leave. In January 2022, there were an average of 2,005 members of service out sick per day; in March 2023, there were 639. The daily average sick leave percentage has declined from 26.1% in January 2022 to 9.5% in March 2023. The Department has agreed with the Monitor to finalize its new Sick Leave and Absence Control Leave Policies by May 15, 2023, and its new MMR policies and procedures by June 30, 2023.

Disciplinary Cases. The Department has agreed with the Monitor to resolve by July 30, 2023, its backlog of pending disciplinary cases for use of force incidents occurring between January 1, 2021 and June 30, 2022. The staff of the Trials Division has increased from 34 in December 2021 to 43 in March 2023, and it has closed 702 of the 750 priority backlog cases (those identified, in consultation with the Monitor, as prioritized for resolution). *See Action Plan F(1),(2) and Consent Judgment VIII(4); see Report at 197* (“Cases that require expedited treatment are in fact being addressed in an expedited manner, especially compared to the protracted processing times that currently characterize most disciplinary matters. . . . [T]he overall resolutions . . . are generally reasonable and mark an impressive step towards imposing close-in-time meaningful discipline for the most egregious incidents.”). Since November 2022, the Trials Division has appeared at OATH on average 96 times a month in cases involving use of force and medical incompetence. *See Action Plan F(10a).* The Trials Division closed 2,163 cases in the past year – about as many cases as were closed in the last five years combined. In addition, the Department has agreed with the Monitor that the Trials Division shall evaluate the use of lower-level sanctions and expungement cases, in consultation with the Monitoring Team, by July 30, 2023.

OATH. As the City’s central administrative law tribunal, OATH is independent from DOC, and OATH Administrative Law Judges render decisions on procedural and substantive matters without external influence. Central to OATH’s mission is ensuring that parties receive a full and fair opportunity to be heard and that cases are adjudicated impartially and in a timely manner. OATH’s compliance with the Remedial Order is measured by its ability to handle cases expeditiously and to render decisions that recommend discipline which is “appropriate, meaningful, and consistent with the Disciplinary Guidelines.” First Remedial C(5)(ii); *see also* Action Plan C.10.

OATH’s compliance with the Action Plan has been strong. As noted in the Monitor’s Report, OATH has “scheduled more pre-trial conferences in 2022 than ever before,” has facilitated a more timely resolution of cases through the pre-trial conference process, is conducting trials closer in time to the pre-trial conferences, and is issuing Reports and Recommendations that “are completed in a timelier fashion and generally reflect an appropriate assessment and analysis of the Department’s disciplinary guidelines.” Report at 105. The Monitor further noted that the Action Plan’s “F2 process has been fruitful” and appears to be “working as designed.” *Id.* at 197-198 ((referring to the expedited scheduled for “egregious” cases)).

Promotions. In its effort to enhance its senior ranks on March 20, 2023, the Department promoted 26 officers to Captain (the first such promotions since 2015); and in December 2022 it promoted 24 Captains to Assistant Deputy Warden. Five more individuals will be promoted to ADW when they finish their training. *See Report at 115.* The Commissioner is firmly committed to training and mentorship that is essential to developing and retaining institutional talent, as well as staff morale.²

Investigations Division (“ID”). The Department is committed to the vigorous investigation of use of force incidents and accountability and discipline for its officers when excessive force is used. In response to the Monitor’s concerns about lax investigations, the Department (i) tasked ID supervisors to review prior investigations; (ii) bolstered future training for investigators; (iii) separated its use of force investigation unit from other investigations; (iv) created a quality assurance division to assess force investigations that are closed without action; (v) began retroactive review of Class A and head strike incidents; and (vi) reopened certain investigations. In addition, in March 2023, the Deputy Commissioner for ID resigned, and a new leader was appointed. The Associate Commissioner for ID, in whom we believe the Monitor has considerable confidence, remains in place. The Monitoring Team has shared that it has already seen a clear improvement in cooperation in ID since the recent leadership changes.

ESU. The Department takes the Monitor’s concerns about the management of ESU (the Department’s emergency response teams) seriously. It has appointed a new leader for ESU who will start in May 2023, and twenty-one individuals as to whom the monitoring team raised concerns have been removed from the unit. The Department is also initiating another round of screening for ESU staff. The Deputy Commissioner of Security Operations and his staff are reviewing a sample of incidents involving ESU on a regular basis to identify any potential issues in real time. In addition, the Department has already reduced its reliance on ESU response. *See Report at 139 (Noting “a shift to problem solving by on-unit staff and supervisors, versus simply outsourcing incident response to Emergency Response Teams as has been the historical practice.”)*

Intake. As detailed in the City’s prior submissions (ECF No. 514, 519), the Department has developed and deployed a New Admission Dashboard to track individuals newly entering its facilities. In the most recent 35-day period, only two of 1,633 new male admissions (0.1%) were housed beyond the 24-hour limit. Likewise, all 126 new women admissions were housed within 24 hours. In addition, the Department is continuing to work on improving use of its tracking system for inter/intra facility transfers. A recent review looked at 24 individuals, and found that 21 were in intake for less than 12 hours; none was there for more than 24 hours. The Department

² The Monitor and the parties have noted concerns about the promotion of several individuals to Assistant Deputy Warden. None of these individuals were promoted in violation of the Nunez Consent Judgment; their disciplinary records did not reach the threshold requiring a special exemption under the Consent Judgment. *See Nunez Consent Judgment at 34; Report at 216.* The Commissioner reviewed these promotions and determined that they were in the best interests of the Department, in light of the candidates’ more recent performance and overall record of service.

has agreed with the Monitor’s request for status reports to the Court on Intake progress on May 17, 2023 and June 16, 2023.

Suicide Prevention. The Department has taken concrete steps in response to the Monitor’s recommendations to prevent self-harm and in-custody deaths. Among other things, in December 2022, the Department hired a highly qualified consultant with more than 20 years experience to review its current policies and procedures on preventing self-harm and in-custody deaths. Working with the consultant, the Department has created a Suicide Prevention Task Force to review such incidents and implement best practices. In addition, the City has developed and convened a mortality review committee to analyze in-custody deaths of which there has been one to date this year. *See Report at 69-71.*

Enhanced Supervision Housing. In consultation with the Monitor and a nationally recognized expert, Dr. James Austin, the Department has developed a new program for Enhanced Supervision Housing (“ESH”). The ESH program is vital to protecting the safety of persons in custody and staff, and reducing the need for the use of force. *See Report at 96-99.* It is designed to separate individuals who have committed serious acts of violence (slashings and stabbings) from general population and to focus on their rehabilitation.

Other Developments.

- The Department installed 850 new state-of-the-art cell doors, and 741 windows have been covered with perforated metal so that they cannot be broken and converted into weapons. *See Action Plan D(5).*
- The Rikers Citywide Task Force has continued to meet weekly to coordinate efforts among many City agencies to facilitate the reforms required by the Action Plan. *See Action Plan B(1)*
- In November 2022, the B.E.A.C.O.N. Center (Building, Educating, Advancing and Creating Opportunities for Networking) was opened at GRVC. The Center affords individuals access to a horticulture program, a music recording studio, a film studio, gaming consoles, and two “serenity rooms” for meditation and relaxation. It is modeled on the P.E.A.C.E. Center (Programs, Education, and Community Participation) at RNDC, which is credited with helping reduce violence there. Access to the center is based on incentive criteria: 30 days infraction free, clean living quarters, and participation in programming.
- In late 2022, tablets were distributed to all incarcerated individuals that allow them to make phone calls in the privacy of their cells. The tablets also allow individuals to access educational materials, podcasts, e-books, and law library materials. This should reduce idleness and incidents of conflict, thus contributing to safety.

Additional Resources. The Department acknowledges the Monitor’s request for additional staffing to support its work. It recently added a fourth attorney to work on Nunez

matters. In addition, the Monitor has unfettered access to Department staff to gather information. The General Counsel as well as several Deputy Commissioners and other senior executives are in regular contact with the Monitor and respond to requests for information or supervise such responses.

Class Counsel's Proposed Court Order. Class Counsel have requested that the Court issue an Order establishing numerous deadlines for the Department. Defendants oppose this request. The Nunez Consent Judgment, the Court's Remedial Orders, and the Action Plan include at least 400 distinct obligations, in addition to the regulatory, legal and constitutional framework in which the Department operates. The Report shows that the Department has made significant progress. Defendants recognize that much remains to be done, and are committed to doing so. The proliferation of additional granular legal obligations is unnecessary and would not advance the reforms that are underway.

We thank the Court for its consideration of this matter.

Respectfully submitted,

Alan H. Scheiner /s/ /
Alan H. Scheiner
Senior Counsel

cc: BY ECF
All counsel of record